IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

FAO.No. 305 of 2005()

AS.80/2001 of SUB COURT, PALA
OS.263/1998 of MUNSIFF COURT, PALA

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: APPELLANT/RESPONDENT/DEFENDANTS

1. KURIAN, S/O.JOSEPH,
CHERADIKKAL, MARANGATTUPALLY,
ELAKKAD VILLAGE.

2. MATHEW, S/O.KURIAN OF DO.DO.

3. JOSEPH OF DO.DO.DO.

BY ADV. SRI.RAJEEV V.KURUP

RESPONDENTS: APPELLANT/PLAINTIFF

JOSEPH, S/O.DEVASIA,
OLIKKAN VEEDU, MARANGATTUPALLY,
ELAKKAD VILLAGE.

BY ADV. SRI.NAGARAJ NARAYANAN
SRI.SAIJO HASSAN
SRI.SABU SREEDHARAN
SRI.A.G.GIRISH KUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 20/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O No. 305 of 2005

Dated this the 20th day of September 2007

JUDGMENT

The respondents in A.S. 80/2001 on the file of the Subjudge, Pala who are the defendants in O.S 263/1998 on the file of the Munsiff Court Pala are the appellants. The appeal is filed against an order dated 27-8-2005 passed by the lower appellate court by which it has set aside a decree and judgment passed by the trial court and remanded the suit for fresh disposal.

2. The respondent/plaintiff filed a suit for declaration that he had acquired a right of way by prescription and also for prohibitory injunction against the appellants/ defendants in the suit. The plaint item No.1 belongs to the plaintiff and he is in absolute possession and enjoyment. The defendants are owners of the property lying on the western side of the plaintiff's property. The plaint item No.2 property is a road for ingress and egress from the plaint item No.1 property to the Kadaplamattom-Elackad P.W.D. road. It was averred that the said road is being used by the plaintiff for the past 30 years prior to the date of filing of the suit without any interruption, openly and as of right. So, he had perfected a prescriptive right of way over the plaint item No. 2 The

pathway is situated on the southern side of the property owned by the defendants. It is having a width of 11 feet. The defendants attempted to cause obstruction to the pathway by putting boulder stones on the road portion and tried to cause obstruction to the vehicular traffic. Hence the suit.

3. The defendants filed joint written statement contending that the description of item No.2 is fraudulent. It was contended that the road leading from P.W.D. road reaches up to the property of the 1st defendant and thereafter from its western side, it takes a turn towards the Labour India Public School. In continuation to the said road, there is only a pathway having a width of 3 feet through the property of the 1st defendant The said lane passes through the property of the defendants and proceeds towards east. At the boundary of the property of the defendants there was a kalluvara except the portion covered by the pathway. The plaintiff is the husband of the 3rd defendant's sister. It was contended that about 3 years back in connection with the marriage of the son of the plaintiff a temporary road was laid dismantling the said kalluvara for the purpose of vehicular traffic. After the marriage, the same was restored to its original position and thereafter, defendants began to construct a building. The plaintiff demanded widening of the lane. The same was refused by the defendants . On 9-4-1998, the plaintiff and his henchmen

attempted to demolish the kalluvara . Thereafter on 20-4-1998 the suit was filed by the plaintiff . On 21-4-1998 in the absence of the defendants the plaintiff removed the kalluvara again and its foundation. The allegation that they caused obstruction to the road was denied. The defendants are entitled to restore the kalluvara in its original position. There was a compromise talk between the plaintiff and defendants and by that compromise the plaintiff also agreed to surrender some portion of his land in favour of the defendants for compensating the land to be given to the plaintiff to construct the road through the defendants' property. But the plaintiff retracted from the compromise. They prayed for a dismissal of the suit.

4. After considering the pleadings and evidence the trial court found that the plaintiff failed to prove the right of the pathway and dismissed the suit . Challenging that decree and judgment the plaintiff filed an appeal before the lower appellate court. The lower appellate court set aside the decree and judgment passed by the trial court and remanded the same. Challenging that order this F.A.O is filed by the respondents in the appeal suit.

5. At the time of admission before this court the appellant raised the following substantial question of law.

Whether the evidence available on record is sufficient to finally dispose of the matter otherwise than through a remand and, therefore, whether the remand is sustainable. ?

6. I have heard both sides.

. 7. Before the lower appellate court it was argued that though the plaintiff examined 7 witnesses , the trial court considered only the oral evidence of PW3 alone and found that his evidence is not reliable. It was also argued that the trial court did not consider the evidence of PWs 1, 2 and 4 to 7 and also the evidentiary value of Exts C1 C1(a) C2 and C2(a) and other documents. It was also argued that, solely relying on Ext. B1 document the trial court found the case put forward by the plaintiff was not genuine. The lower appellate court which is the final court of fact without re- appreciating the evidence set aside the decree and judgment passed by the trial court and remanded the matter for fresh disposal. A remand for the purpose of remand cannot be allowed. The lower appellate court ought to have considered the relevancy of documents. It also ought to have considered the evidences of PWs 1 2 and 4 to 7, Exts C1 and C2 series and also other documents before taking a decision. The lower appellate court ought not have disposed of the appeal without evaluating the evidences of other witnesses. It should consider the evidence and take a decision. The order of remand passed by the lower appellate court is unjustifiable and unsustainable. Of course if after considering the entire evidences the lower appellate court comes to a

conclusion that the case is to be remanded . It may do so. The order of remand is unsustainable and liable to be set aside. I do so.

8. In the result, the appeal is allowed. The order passed by the lower appellate court on 27-8-2005 in A.S. 80/2001 remanding O.S. 263/1998 to the trial court is hereby set aside. A.S. 80/2001 is remanded to the lower appellate court. The lower appellate court is directed to take A.S. 80/2001 back to into file and dispose of the same afresh, in accordance with law with due notice to the parties.

K.PADMANABHAN NAIR,JUDGE

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